

1 WO

JL

2

3

4

5

6 **IN THE UNITED STATES DISTRICT COURT**

7 **FOR THE DISTRICT OF ARIZONA**

8

9 Travis L. Ware,

10 Plaintiff,

11 v.

12 City of Phoenix, et al.,

13 Defendants.

14

15 No. CV 19-02896-PHX-MTL (ESW)

16

17 **ORDER**

18

19

20

21

22

23

24

25 **I. Procedural History**

26 On May 7, 2019, Plaintiff Travis L. Ware, who was then confined in the Arizona
27 State Prison Complex-Douglas and is now confined in the Southeast Correctional Center
28 in Charleston, Missouri, filed a pro se civil rights Complaint pursuant to 42 U.S.C. § 1983
and an Application to Proceed In Forma Pauperis. In a May 8, 2019 Order, the Court
denied the deficient Application to Proceed and gave Plaintiff 30 days to pay the filing and
administrative fees for this action or file a complete Application to Proceed In Forma
Pauperis. Plaintiff subsequently filed two more deficient Applications to Proceed In Forma
Pauperis, which the Court denied with leave to re-file on June 6, 2019, and July 2, 2019,
respectively.

29 On July 15, 2019, Plaintiff filed his fourth Application to Proceed In Forma
30 Pauperis. In an October 8, 2019 Order, the Court granted the Application to Proceed and
31 dismissed the Complaint with leave to amend because Plaintiff had failed to state a claim.
32 The Court gave Plaintiff 30 days to file an amended complaint that cured the deficiencies

1 identified in the Order.

2 On October 28, 2019, Plaintiff filed a “Motion to Reconsider/Extension of Time.”
3 On November 1, 2019, Plaintiff filed a “Motion of Discovery Exculpatory Evidence.” In
4 a December 23, 2019 Order, the Court denied Plaintiff’s Motion for Discovery. The Court
5 granted the “Motion to Reconsider/Extension of Time” in part and gave Plaintiff an
6 additional 60 days to file an amended complaint in compliance with the October 8, 2019
7 Order and denied the Motion in all other respects. The Court explicitly warned Plaintiff
8 that if he failed to file an amended complaint within 60 days, this case would be dismissed
9 without further notice to him.

10 On March 11, 2020, not having received an amended complaint or a motion for
11 extension of time, the Clerk of Court dismissed this action with prejudice and entered
12 Judgment. (Doc. 22.) The same day, the Court received Plaintiff’s First Amended
13 Complaint (Doc. 23), which he signed on March 2, 2020. Under the prison “‘mailbox rule,’
14 . . . a legal document is deemed filed on the date a [plaintiff] delivers it to the prison
15 authorities for filing by mail.” *Lott v. Mueller*, 304 F.3d 918, 921 (9th Cir. 2002).
16 Plaintiff’s First Amended Complaint is deemed to have been timely filed on March 2, 2020.
17 Therefore, the Court will vacate the March 11, 2020 Judgment, and reopen this case. The
18 Court will dismiss the First Amended Complaint and this action.

19 **II. Statutory Screening of Prisoner Complaints**

20 The Court is required to screen complaints brought by prisoners seeking relief
21 against a governmental entity or an officer or an employee of a governmental entity. 28
22 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff
23 has raised claims that are legally frivolous or malicious, that fail to state a claim upon which
24 relief may be granted, or that seek monetary relief from a defendant who is immune from
25 such relief. 28 U.S.C. § 1915A(b)(1)–(2).

26 A pleading must contain a “short and plain statement of the claim *showing* that the
27 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does
28 not demand detailed factual allegations, “it demands more than an unadorned, the-

1 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
2 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere
3 conclusory statements, do not suffice.” *Id.*

4 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
5 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,
6 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content
7 that allows the court to draw the reasonable inference that the defendant is liable for the
8 misconduct alleged.” *Id.* “Determining whether a complaint states a plausible claim for
9 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
10 experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s specific factual
11 allegations may be consistent with a constitutional claim, a court must assess whether there
12 are other “more likely explanations” for a defendant’s conduct. *Id.* at 681.

13 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts
14 must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338, 342
15 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent
16 standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v. Pardus*, 551
17 U.S. 89, 94 (2007) (per curiam)).

18 **III. First Amended Complaint**

19 In his First Amended Complaint, Plaintiff seeks monetary relief from Defendants
20 City of Phoenix, City of Tempe, City of Douglas, and the State of Arizona. Plaintiff asserts
21 claims related to his arrest.

22 In Count One, Plaintiff alleges that he was arrested without probable cause. He
23 asserts that he was given the option to remedy “the issue” by pleading guilty “with the
24 intention to subject [him] to denial of [his] constitutional rights.” Plaintiff further claims
25 he suffered multiple bodily injuries due to an “incident.”

26 Plaintiff designates Count Two as a claim for “municipal” liability based on the
27 failure of the State of Arizona to “discipline” municipal policymakers “on a specific
28 instance [of] violation of [the Fourth] Amendment.” Plaintiff appears to allege that a “tort

1 remedy” is available against individuals acting as advocates on behalf of the State who,
2 under the color of state law, “subject[s] or causes to be subjected” any citizen of the United
3 States to the deprivation of any rights, privileges, or immunities secured by the Constitution
4 “and laws.” As his injury, Plaintiff claims that as a result of a “civil conspiracy,” he was
5 deprived of liberty and suffered multiple bodily injuries.

6 In Count Three, Plaintiff alleges that state officials deprived him of federal rights
7 by omitting to perform an act that they are legally required to perform, which caused the
8 deprivation. He appears to assert that St. Luke’s Tempe Hospital and the “Douglas Mohave
9 AZ medical system” breached the standard of care, and as a result, he suffered severe
10 bodily injuries.

11 **IV. Failure to State a Claim**

12 **A. State of Arizona**

13 The State of Arizona is not a proper Defendant. Under the Eleventh Amendment to
14 the Constitution of the United States, a state or state agency may not be sued in federal
15 court without its consent. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100
16 (1984); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Furthermore, “a state is not a
17 ‘person’ for purposes of section 1983.” *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320,
18 1327 (9th Cir. 1991) (citation omitted). Therefore, the Court will dismiss Defendant State
19 of Arizona.

20 **B. City Defendants**

21 A municipality may not be sued solely because an injury was inflicted by its
22 employees or agents. *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006).
23 The actions of individuals may support municipal liability only if the employees were
24 acting pursuant to an official policy or custom of the municipality. *Botello v. Gammick*,
25 413 F.3d 971, 978-79 (9th Cir. 2005). A § 1983 claim against a municipal defendant
26 “cannot succeed as a matter of law” unless a plaintiff: (1) contends that the municipal
27 defendant maintains a policy or custom pertinent to the plaintiff’s alleged injury; and
28 (2) explains how such policy or custom caused the plaintiff’s injury. *Sadoski v. Mosley*,

1 435 F.3d 1076, 1080 (9th Cir. 2006) (affirming dismissal of a municipal defendant pursuant
2 to Fed. R. Civ. P. 12(b)(6)). Plaintiff has failed to allege facts to support that the City of
3 Phoenix, City of Tempe, or City of Douglas maintained a specific policy or custom that
4 resulted in a violation of Plaintiff's federal constitutional rights and has failed to explain
5 how his injuries were caused by any municipal policy or custom. Thus, the Court will
6 dismiss without prejudice Defendants City of Phoenix, City of Tempe, and City of
7 Douglas.

8 **C. Claims for Damages Barred**

9 A prisoner's claim for damages cannot be brought under 42 U.S.C. § 1983 if "a
10 judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction
11 or sentence," unless the prisoner demonstrates that the conviction or sentence has
12 previously been reversed, expunged, or otherwise invalidated. *Heck v. Humphrey*, 512
13 U.S. 477, 486-87 (1994). Plaintiff pleaded no contest to a dangerous drug violation in
14 Maricopa County Superior Court case #CR2018-159265; pleaded no contest to one count
15 of aggravated assault in #CR2018-161415; and pleaded guilty to one count of possession
16 of a dangerous drug in #CR2019-106078.¹ Those convictions have not been reversed,
17 expunged, or otherwise invalidated. Although Plaintiff's allegations are not entirely clear,
18 his claims that he was arrested without probable cause, or that his Fourth Amendment rights
19 were otherwise violated, imply the invalidity of his convictions, and his claims are
20 therefore barred by *Heck*.

21 **V. Dismissal without Leave to Amend**

22 Because Plaintiff has failed to state a claim in his First Amended Complaint, the
23 Court will dismiss his First Amended Complaint. "Leave to amend need not be given if a
24 complaint, as amended, is subject to dismissal." *Moore v. Kayport Package Express, Inc.*,
25 885 F.2d 531, 538 (9th Cir. 1989). The Court's discretion to deny leave to amend is

26
27 ¹ See <http://www.courtminutes.maricopa.gov/viewerDoc.asp?sadID=41250> (last
28 accessed March 13, 2020); <http://www.courtminutes.maricopa.gov/viewerDoc.asp?sadID=41252> (last accessed March 13, 2020);
<http://www.courtminutes.maricopa.gov/viewerDoc.asp?sadID=41251> (last accessed March 13, 2020).

1 particularly broad where Plaintiff has previously been permitted to amend his complaint.
2 *Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996).
3 Repeated failure to cure deficiencies is one of the factors to be considered in deciding
4 whether justice requires granting leave to amend. *Moore*, 885 F.2d at 538.

5 Plaintiff has made multiple efforts at crafting a viable complaint and appears unable
6 to do so despite specific instructions from the Court. The Court finds that further
7 opportunities to amend would be futile. Therefore, the Court, in its discretion, will dismiss
8 Plaintiff's First Amended Complaint without leave to amend.

9 **IT IS ORDERED:**

10 (1) The Clerk of Court must **vacate** the March 11, 2020 Judgment (Doc. 22) and
11 reopen this case.

12 (2) Plaintiff's First Amended Complaint (Doc. 23) and this action are **dismissed**
13 for failure to state a claim pursuant to 28 U.S.C. § 1915A(b)(1), and the Clerk of Court
14 must enter judgment accordingly.

15 (3) The Clerk of Court must make an entry on the docket stating that the
16 dismissal for failure to state a claim may count as a "strike" under 28 U.S.C. § 1915(g).

17 (4) The docket shall reflect that the Court, pursuant to 28 U.S.C. § 1915(a)(3)
18 and Federal Rules of Appellate Procedure 24(a)(3)(A), has considered whether an appeal
19 of this decision would be taken in good faith and certifies that an appeal would not be taken
20 in good faith for the reasons stated in the Order and because there is no arguable factual or
21 legal basis for an appeal.

22 Dated this 16th day of March, 2020.

23
24 
25

26 Michael T. Liburdi
27 United States District Judge
28